No. 78-443

IN THE

Supreme Court of the United States

October Term, 1978

HARRAH INDEPENDENT SCHOOL DISTRICT, L. M. SULLIVAN, EDWARD BROZOWSKI, WALTER HELM, LOYD MIXON, HAROLD MANWELL, JOE ZAWISKA, and PAUL THOMAS,

Petitioners,

v.

MARY JANE MARTIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

Respectfully submitted,
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BRIEF IN OPPOSITION

The petition in this case is misleading as to the issue of law determined by the court below and inaccurate in its description of the operative facts as found below. The decision below rests on two independent and well established legal grounds: first, that the due process clause of the Fourteenth Amendment is violated when a local government entity arbitrarily and capriciously deprives a citizen of a property interest, Pet. App. at 14; and second, that the equal protection clause of the Fourteenth Amendment is violated when a local government entity takes an action against a citizen based on a classification for which there is no

rational basis, *id.* These rules of law were applied by the court below to a particular set of facts which is unique and unlikely to recur. There is nothing about this case that makes it worthy of this Court's time and attention.

I. Due Process

A. Relying primarily on a quotation from the decision of the Seventh circuit in *Jeffries* v. *Turkey Run Consolidated School District,* 492 F.2d 1 (7th Cir. 1974), the petition argues that the court below could not properly have found a violation of due process absent a violation of procedural due process. However, the petition's quotation from *Turkey Run* is taken out of context: respondent here was a tenured teacher with a *property* interest in continued employment, Pet. App. at 11, whereas the claimant in *Turkey Run* had no property or liberty interest. The court in *Turkey Run* was careful to distinguish the protection afforded by the due process clause against arbitrary and capricious deprivations of a property or liberty interest, from the situation before it in which no property or liberty interest was implicated, *id.* at 4-5, and n. 12, 13, and 14.

Decisions of the Seventh Circuit, and of every other Circuit to consider the issue, since *Turkey Run,* have continued to adhere to both propositions embodied in the distinction stated in *Turkey Run*: the due process clause provides no protection to one who has neither a liberty nor property interest at stake; *but,* where such an interest is at stake, the right to due process protects that interest against arbitrary and capricious deprivation by the state.[1] In recognizing the

[1] *Stebbins* v. *Weaver,* 537 F.2d 939, 943 n. 2 (7th Cir. 1976); *Buhr* v. *Public School Dist.,* 509 F.2d 1196, 1203 (8th Cir. 1974); *McGhee* v. *Draper,* 564 F.2d 902, 912-13, n. 8a (10th Cir. 1977);

second of these propositions—the one applicable here—those decisions were doing no more than applying a rule of law well-established by this Court's decisions—as again, the court in *Turkey Run* expressly stated. *Id.*

The petition is simply wrong in suggesting that this Court has not decided the question whether the due process clause protects property or liberty against arbitrary and capricious deprivation by the state. This Court has stated that "the protection of the individual against arbitrary action . . . [is] the very essence of due process," *Slochower* v. *Board of Education,* 350 U.S. 551, 559 (1956), and has not hesitated to invalidate governmental action that arbitrarily deprived individuals of their property or liberty interests.[2] Indeed, the Court has viewed the procedural safeguards required by the due process clause as necessary to achieve the paramount aim of protecting against such arbitrary deprivations, *id, Board of Regents* v. *Roth,* 408 U.S. 564, 577 (1972).

B. The court below applied the rule of law just described to a set of facts which, because of its uniqueness, provides no opportunity for generalization—a set of facts which, incidentally, bears only slight resemblance to the facts as set forth in the petition.

Respondent, Mrs. Martin, was a *tenured* teacher employed for a number of years by petitioner Harrah Inde-

Sullivan v. *Brown,* 544 F.2d 279, 282 (6th Cir. 1976), *Weathers* v. *County School District,* 530 F.2d 1335, 1341, 1342 (10th Cir. 1976).

[2] *Slochower, supra; Wieman* v. *Updegraff,* 344 U.S. 183, 191-2 (1952); *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 239 (1957); *Konigsburg* v. *State Bar,* 353 U.S. 252, 262, 273 (1957). *Cf. Cafeteria Workers* v. *McElroy,* 367 U.S. 886, 898 (1961). *See generally, Turkey Run, supra,* 492 F.2d at 4-5.

pendent School District.[3] Pet. App. at 11, 4 n. 3, 6-7, 21. Both during and after Mrs. Martin's employment with the School District, the Board had the following policy: "Teachers holding a bachelors degree shall be required to earn five (5) semester hours every three years."[4] Prior to 1974, that policy was enforced by denying salary increments to teachers who had not complied with it. Pet. App. at 2. During that period, Mrs. Martin, "for a variety of reasons including her involvement in the school's extracurricular programs," *id.*, had voluntarily, and without disapproval from the School Board, chosen not to earn continuing education credits and thereby had foregone salary increments. In 1974, the State Legislature made salary increments mandatory. As a result, the Board sought to enforce its continuing education policy with a different sanction: non-renewal. Apart from this change in sanction, the continuing education policy of the School District remained otherwise the same, except as it applied to Mrs. Martin and three others who had similarly relied on the option to forego salary increments, *id.* at 2-3. Except for that "insular group of four," *id.* at 14, all teachers in the district, whether hired before or after the change in sanction, were given three years to achieve the five credits specified by the continuing education policy, *id.* at 2.

Mrs. Martin and the others of her "insular group of four," however, were subjected to "disparate treatment,"

[3] Under then applicable Oklahoma law, a tenured teacher was entitled to renewal absent " 'immorality, willful neglect of duty, cruelty, incompetency, teaching disloyalty to the American Constitutional system of government; or any reason involving moral turpitude.' Okla. Stat., tit. 70, 6-122 (Supp. 1973) (repealed 1977), *id.* at 2." Pet. App. at 2.

[4] Record, Vol. III, ex. 2, p. 8; Pet. App. at 2-3, 12. "This rule remained in effect throughout the dispute and litigation below," *id.* at 2.

id. at 14. They were given seven months to "complete" the five credits that all other were given three years to complete, Pet. App. at 3, 7, 12-14.[5]

Mrs. Martin did not earn the credits "within the seven month period imposed on her." Pet. App. at 3. Consequently, the School Board voted at its April 1974 meeting not to renew her contract, *id.*, even though as Board President and petitioner Sullivan repeatedly testified, Mrs. Martin was "a good teacher" who did all that was asked of her and more. Record, vol. IV at 72; vol. II, ex. 4 at 45-6. As the court of appeals noted, Pet. App. at 3, n. 1, Mrs. Martin testified at trial that compliance within that short time would have "amounted to an impossible burden" because,

> I was coaching High School and I was gone sometimes four nights a week and I thought that was enough for my marriage to stand, at that particular time.

She did, however, obtain the five credits within less than three years of being informed of the necessity of doing so, *id.* at 5.

It was to these facts that the court of appeals applied the well recognized rule of law that a property interest may not be taken arbitrarily by the government. The conclusion of the court that the School Board's action was "arbitrary

[5] The assertion in the petition that Mrs. Martin merely had to enroll in courses by April 1974, rather than complete them, conflicts with the findings of the lower courts. Pet. App. at 3, 7, 12-14. These findings are supported by such evidence as Mrs. Martin's testimony that "I had from September to April" to comply, Record, vol. IV at 36, and the fact that the letter sent to her by the Board on September 6, 1973 spoke in terms of "correct[ing] the deficiency," not "enrollment." Record, vol. III, ex. 3. The petition merely refers to two statements made by President Sullivan (one of which is from a state court proceeding not on review here), regarding his personal views, not what he told Mrs. Martin.

and capricious'' is, with all this in mind, hardly surprising. But more important, that decision involves application of well-settled law to a unique situation that is unlikely to recur. The court of appeal's decision on this issue presents nothing worthy of plenary consideration by this Court.

II. Equal Protection

An independent basis for the lower court's decision was that ''there is no rational basis for the Board's action'' because it rested on ''an unreasonable classification.'' It is, of course, well-established that the state may not classify persons into distinct groups, with one group advantaged over another, unless the classification is rationally related to a permissible state object; where a classification does not have such a rational basis, it violates the equal protection clause of the Fourteenth Amendment.[6]

The court found no reasonable basis ''for the board's disparate treatment of plaintiff's insular group of four,'' and the Board has suggested none. The only justification asserted by the Board when it terminated Mrs. Martin's employment was its ''concern that plaintiff not go unpunished for her previous choices not to acquire additional credits,'' Pet. App. at 13, choices which, the court below observed, were entirely ''lawful,'' *id.* But her ''previous choice'' had already had the result prescribed by the School District policy: loss of her salary increments. The court found that the desire retroactively to apply the punishment of termination for her *previous* conduct was not a legitimate state objective. Pet. App. at 14.

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[6] *E.g., Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 (1971); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955); *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U.S. 150 (1897).

In its petition, the Board now suggests additional ''justifications'' for the classification it adopted. Pet. at 12-14. These new attempts at justification, however, do nothing more than support the rationality of the adoption of a compulsory continuing education program. But, as the court below made clear, the adoption of a consistently applied continuing education program is not the issue here. Pet. App. at 13. The issue is the permissibility of the classification by which Mrs. Martin and three other teachers were required to achieve in seven months the number of continuing education credits that all other teachers were given three years to achieve. The Board's asserted justifications offer no support for such differing time requirements.

As with the due process issue, the application by the court below of a well-established rule of law to the particular facts at issue here presents nothing worthy of this Court's plenary review.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

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